From:	Hatfield, William S.
To:	Gordon, David L. (ENRD); Thomas.Carroll@USDOJ.GOV; Yacovone, Krista
Cc:	Otero, Camille V.
Subject:	LCP Litigation
Date:	Friday, June 8, 2018 12:26:37 PM
Attachments:	2018-03-23 Order on Unsealing Motion.pdf Order Denying Summary Judgment May 30 2018.pdf Order Striking Affirmative Defenses May 30, 2018.pdf

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Counsel:

Attached for your review and information are two recent decisions by Judge DeAngelis (Morris County, NJ) in the *Ashland v. G-I, et. al.* matter concerning the LCP site.

- On March 22, 2018, Judge DeAngelis granted the Ashland Parties' motion to unseal certain documents that the G-I Parties had claimed as privileged finding those documents were not privileged.

- On May 30, 2018, Judge DeAngelis denied G-I's motion for SJ on the bankruptcy discharge and granted the Ashland Parties' motion to strike that affirmative defense.

Be advised that the G-I parties have appealed the March 22 decision on the unsealing motion, which is now pending before the Appellate Division, and that the documents at issue remain sealed pending a determination by the Appellate Division.

Please let us know if you have any questions.

Bill

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Attorneys for Plaintiffs
Ashland LLC (f/k/a Ashland Inc.),
International Specialty Products Inc., and
ISP Environmental Services Inc.

ASHLAND INC.; INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES INC., Plaintiffs, v. G-I HOLDINGS INC.; GAF CORPORATION; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; and FICTITIOUS COMPANIES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-2331-15 Civil Action **ORDER**

THIS MATTER having been brought before the Court upon the motion of Gibbons P.C., attorneys for Plaintiffs Ashland LLC (f/k/a Ashland Inc.), International Specialty Products Inc., and ISP Environmental Services Inc., and the Court having reviewed the Memorandum of Law Certification of Counsel in support of the motion and any timely opposition submitted thereto, and good cause having been shown;

IT IS on this 22nd day of ~~February~~ March, 2018;

ORDERED that Plaintiffs' Motion for *In Camera* Inspection and Determination That Certain Documents Are Not Privileged is hereby **GRANTED**; and it is further

ORDERED that the GAF legal documents covered by the Motion and authored by Celeste Wills or Benedict G. Stefanelli (Exhibits A, B, and D to the Certification submitted in support of the Motion) are no longer privileged with respect to Defendants, and those and similar documents may be disclosed by Plaintiffs in this matter without sealing and to third parties outside of this matter without restriction; and it is further

ORDERED that a copy of this Order be served upon all counsel of record within ~~seven~~ 5 ~~(7)~~ days of Defendant's counsel's receipt hereof.

HON. FRANK J. DEANGELIS, J.S.C.

This Motion is

__✓__ Opposed

_____ Unopposed

See attached decision.

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2331-15

ASHLAND INC., INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES, INC.,

Plaintiff(s),

v.

G-I HOLDINGS INC.; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; GAF CORPORATION; JOHN AND JANE DOES 1-20; and ABC COMPANIES 1-20

Defendant(s).

Decided: March 22, 2018

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FRANK J. DEANGELIS, J.S.C.

The current matter comes before the Court by way of Plaintiffs' Motion for *In Camera* Inspection and determination that certain documents are no longer privileged. By way of background, this matter arises out of a claim for breach of an indemnification agreement. The dispute between the parties ensued after a series of corporate mergers and restructuring led to a disagreement with regard to the inheritance of certain environmental liabilities. In 2011 Ashland, LLC ("Ashland") acquired International Specialty Products ("ISP") and its subsidiary ISP Environmental Services Inc. ("IES") (collectively, "Plaintiffs") from G-I Holdings Inc. ("G-I"). Prior to Ashland's acquisition of ISP and its subsidiaries, ISP, G-I, GAF Corporation ("GAF"), Buildings Materials Corporation of America ("BMCA") and other related parties and affiliates owned by the Heyman family were represented by a shared legal department. Following the sale of ISP and its subsidiaries to Ashland, some attorneys, including Ms. Levine (formerly known as Ms. Wills), were retained by G-I and its

affiliates and others went to Ashland. Similarly, the files from the shared legal department were divided with ISP-related files going to ISP and files related to G-I/GAF matters going to G-I. Furthermore, prior to, during and post-sale of ISP a number of confidential documents were exchanged between the parties, many of which were exchanged pursuant to a confidentiality agreement that had a three-year sunset provision, which expired on November 11, 2013.

The documents Plaintiffs submit for *in camera* inspection relate to liability for the remediation of the Superfund Site in Linden, New Jersey ("LCP site"). These documents were authored by Ms. Levine and directed to G-I, but were transferred to Ashland following the closing on its Stock Purchase Agreement of ISP. Ashland is now moving to unseal these documents on the ground that any privilege once held by the G-I Defendants was waived when the documents were transferred to Ashland. G-I opposes Ashland's request to unseal the documents arguing that the memoranda Ashland seeks to unseal are subject to joint privilege.

R. 1:38-11 provides that

> (a) Information in a court record may be sealed by court order for good cause as defined in this section. The moving party shall bear the burden of proving by a preponderance of the evidence that good cause exists.
> (b) Good cause to seal a record shall exist when:
> (1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and

> (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection pursuant to R. 1:38.

Moreover, according to R. 1:38-3, "[t]he following court records are excluded from public access: [r]ecords required to be kept confidential by statute, rule, or prior case law consistent with this rule, unless otherwise ordered by a court. These records remain confidential even when attached to a non-confidential document." A court record, once sealed, however, is subject to unsealing on motion by any person or entity on good cause shown. R. 1:38-12.

As a preliminary matter, the Court examines the standing issue that was raised by G-I. G-I argues that because Plaintiffs seek to provide the memoranda at issue to third-parties that this Court does not have jurisdiction to address the privilege of the memoranda because its opinion would be advisory. New Jersey courts take a liberal approach to standing requirements. Crescent Park Tenants Ass'n v. Realty Equities Corp. of New York, 58 N.J. 98, 107-08 (1971) ("Unlike the Federal Constitution, there is no express language in New Jersey's Constitution [confining] our judicial power to actual cases and controversies. Nevertheless, we will not render advisory opinions or function in the abstract nor will we entertain . . . plaintiffs who are 'mere intermeddlers,' or are merely interlopers or strangers to the dispute."). The

question before the Court is whether the memoranda provided for the Court's *in camera* review on the subject of liabilities for the cleanup of the LCP site, the subject of this litigation, are subject to attorney-client privilege and should thus be under seal. The Court does not address the merits of each memorandum at this stage, however, the memoranda are unquestionably relevant to this litigation because they show the impressions of where certain parties thought the liabilities for the LCP site lie, at that point in time. The question before the Court is not whether the memoranda can be provided to third-parties but whether the memoranda should be sealed in *this litigation* as subject to attorney-client privilege. Therefore, the Court has jurisdiction to decide the motion before it.

"The attorney-client privilege" is a common-law privilege that "protects communications between attorneys and clients from compelled disclosure." In re Teleglobe Communs. Corp., 493 F.3d 345, 359 (3d Cir. 2007). In order for the privilege to apply, there must be "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." Id. (quoting Restatement (Third) of the Law Governing Lawyers § 68 (Am. Law. Inst. 2000)). The attorney-client privilege is ordinarily waived when a confidential communication between an attorney and a client is revealed to a

third party. Stengart v. Lobing Care Agency, Inc., 201 N.J. 300, 323 (2010).

There are two exceptions that protect disclosure of communications to third parties in cases where that communication is known to multiple parties - common interest exception and joint privilege exception. Teleglobe, 493 F.3d at 364. The common interest privilege protects "all communications shared within a proper 'community of interest'" and is usually applied when two or more attorneys represent common interests of two or more parties. Id. at 364. The joint privilege exception, also known as co-party privilege, generally applies to representations of common interest of two or more parties by the same attorneys, such as a shared in-house legal department that represents a parent company and its subsidiaries. Id.

These doctrines do not create new independent privilege exceptions. O'Boyle v. Borough of Longport, 218 N.J. 168, 197 (2014). Rather, the doctrines instruct that, in certain circumstances, parties with joint representation or joint interests in legal proceedings do not waive the attorney-client privilege as to a third-party by exchanging communications with each other on matters within their common interest. See id. at 187; Teleglobe, 493 F.3d at 364. In other words, the joint privilege and common-interest rules allow the withholding party to share privileged communication with others that are within a

community of interest without waiving the underlying privilege. Should parties to a joint defense agreement become adverse in subsequent proceedings, however, the previous communications between the parties that were made pursuant to the joint defense agreement can lose their privileged status unless the parties explicitly agree otherwise. See Restatement (Third) of Law Governing Lawyers, § 76 cmt. f; see also Restatement (Third) of Law Governing Lawyers, § 75 cmt. e. The court in Teleglobe noted that for this reason, companies must be considerate of the possible divergent interests of the parties to joint privilege and that, particularly, in situations involving spinoffs, companies should consider separate representation for subsidiaries and a parent or risk forced production of documents in adverse litigation. Teleglobe, 493 F.3d at 372-374.

Plaintiffs argue that Ashland is a third-party and that G-I waived any privilege in the documents when it voluntary disclosed the documents to Ashland, a non-client third party. G-I counters that joint privilege extends to Ashland as the parent to ISP and EIS. G-I concludes that Ashland, therefore, cannot disclose the documents to third parties because joint privilege requires that both holders of the privilege consent before any waiver as to third parties can take effect. Even if the Teleglobe decision is interpreted as lending support to G-I's contention that the joint privilege of a spinoff subsidiary extends to a new parent

corporation that possesses documents subject to joint privilege between the spinoff and its previous parent company, such a holding would not affect the waiver of privilege in the current case. As discussed above, Teleglobe does not affect the waiver of privilege where co-clients engage in adverse litigation against each other. In Teleglobe, the Third Circuit remanded the case to the District Court to determine whether the Debtors were party to a joint representation on a matter of common interest with BCE, because if joint representation is found, one of the joint clients cannot withhold otherwise privileged communications from the other. This holding does not affect waiver of privilege to third parties once the privilege is waived in an adverse proceeding between co-clients. The waiver of privilege as to co-clients and third parties when co-clients are in adverse proceedings is also consistent with recent case law and Restatements relied upon by the Third Circuit in Teleglobe. See O'Boyle, 218 N.J. at 187; see also Restatement (Third) of Law Governing Lawyers, § 75 (e) "[d]isclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons" and id. at cmt. e "*in the absence of subsequent adverse proceedings* between them, one co-client may not waive the privilege with respect to communications made by another, objecting co-client." (emphasis added).

G-I argues that Restatement (Third) of Law Governing Lawyers, § 75 and cases following the decision in Teleglobe, indicate that disclosure of documents in subsequent adverse proceedings between the parties who share joint privilege is not a blanket waiver of that joint privilege as to third parties. In support of its argument, G-I first points to comment d of the Restatement, § 75, which explains that "[a]s stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, ***one of them may not invoke the attorney-client privilege against the other*** with respect to communications involving either of them during the co-client relationship." Restatement (Third) of the Law Governing Lawyers, § 75, commend d. G-I maintains that the only logical reading of the emphasized portion of that comment would require a conclusion that parties to prior joint representation may not invoke attorney-client privilege in a subsequent adverse proceeding against one another, but may still invoke it against third parties. Such a reading of the comment, however, would require the Court to go beyond the plain text of the Restatement and add or infer additional language into the comment.

Section 75 of the actual Restatement states:

> (1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless

> it has been waived by the client who made the communication.
> (2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Restatement (Third) of the Law Governing Lawyers, § 75. In light of § 75(2) titled "Privilege of Co-clients," which talks only about waiver of co-client privilege in a subsequent adverse proceeding and makes no reference to third parties, it is, at best, unclear that the comments and the Restatement refers to preservation of privilege with respect to third-parties when it mentions waiver of privilege against the co-clients.

At the outset the Court notes that this is an issue of first impression under New Jersey law. Further, the Court is aware that when looking at these statements under the lens focused on privilege within the third-party context and the facts specific to this case, it is easy to ascribe the words of the Restatement the meaning proposed by the G-I Defendants. However, when looked at in the context of well-established privilege law with the understanding that § 75 was written to explain the application of privilege to jointly represented co-clients and to define the joint privilege exception, the only clear reading of the Restatement compels all references to co-clients and their relationship to one another to remain just that. Therefore, the statements referring to invocation of attorney-client privilege by one co-client

"against the other" or waiver of privilege between co-clients in a subsequent adverse proceeding "between them," means nothing more than the fact that if there is a subsequent adverse proceeding between one co-client and a third-party, the joint communication remains privileged, if there is a subsequent adverse proceeding between the co-clients, the privilege is waived. The Restatement does not indicate that this waiver is not absolute. To hold that the waiver would be effectuated only with respect to the adverse litigation between the co-clients, but the communication would remain shielded from third-parties requiring the automatic sealing of court documents and proceedings in every adverse proceeding between former co-clients, would require the Court to carve out a significant exception to the general attorney-client privilege law and extend the co-client privilege exception beyond the plain reading of § 75 of the Restatement and the Teleglobe decision.

Illustration in comment d of Restatement (Third) of the Law Governing Lawyers, § 75 which G-I Defendants find particularly instructive, runs afoul of the same result that would require the Court to infer additional language into the Restatement if the Court were to accept G-I's reading of the text. The illustration reads:

> Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X

> outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. ***Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged.*** That result follows although Y never knew the contents of the letter during the joint representation.

Restatement (Third) of the Law Governing Lawyers, § 75, comment d (emphasis added). G-I argue that the emphasized portion of the Restatement confirms that any joint privilege is not waived to the world by virtue of the dispute between the parties, but is only waived as to the co-clients. Once again, the illustration must be looked at in the context of the Restatement as a whole. Comment d does not discuss the relationship between co-clients' joint privilege and third-parties. Instead, it discusses the joint privilege exception in the context of adverse proceedings, explaining that once co-clients become adverse, any privilege that is subject to joint privilege exception is waived, even if documents were not affirmatively disclosed to the co-party during the joint representation. Id. Notably, the illustration states that "X's memorandum *would be* privileged against a third person," that is normally, in the absence of adverse proceedings, the document would be privilege against the third-person, but "in the litigation between X and Y the memorandum is not privileged," that

is, the privilege is waived by the adverse proceeding between the parties. Id. (emphasis added). The drafters of the Restatement could have said that [a]lthough the memorandum *is* privileged against a third person, it is not privileged between X and Y, but did not. Furthermore, the last sentence of the illustration makes clear that the purpose of the illustration is to explain that a co-client waives the privilege in a subsequent adverse proceeding even if it is unaware of the contents of certain privileged documents, not to extend the co-client privilege beyond the traditional principles of the waiver doctrine as to third-persons. Id. Instead, comment e deals with waiver to third-parties, stating that "[d]isclosure of a co-client communication in the course of subsequent adverse proceeding between co-clients operates as waiver by subsequent disclosure under § 79 with respect to third persons." Nothing in this statement or § 79 indicates additional protections or exceptions from waiver of communications in adverse proceedings.

G-I further cites In re Crescent Resources, LLC, 457 B.R. 506, 509-10 (Bankr. W.E. Tex. 2011) in support of its argument. The decision of the United States Bankruptcy Court for the Western District of Texas is not binding on this Court. In that case, the court decided that joint privilege between parties in an adverse proceeding is not waived against third parties absent consent of all parties. In re Crescent Resources, LLC, 457 B.R. at 529-30.

Rejecting decisions of Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) and Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D. Ill. 1988), the court in In re Crescent found that any other reading of Restatement (Third) of Law Governing Lawyers, § 75 and its comments would render the bilateral control rule of joint privilege superfluous. Id. Additionally, the court cited a treatise by Edna Selan Epstein, discussing the waiver of common-interest privileges, stating:

> After a falling-out between parties who made confidential communications in their common interest, the privilege continues to apply against third parties not privy to the privilege. That is, neither party may unilaterally waive the joint privilege.

Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product Doctrine 145 (3rd ed. 1997). The court also relied on Teleglobe's holding that "waiving the joint-client privilege requires the consent of all joint clients," however, Teleglobe referenced the ability of a party to unilaterally waive joint privilege as to third parties in a situation not involving a waiver during an adverse proceeding between co-clients. Id. at 529, citing Teleglobe, 493 F.3d at 363. This Court respectfully disagrees with the In re Crescent court's reading of the Restatements and the Teleglobe decision.

This Court finds that the relevant treatise reiterates the bilateral control rule of the joint privilege doctrine in the

absence of any waiver between the co-clients but does not address third-party waiver of joint privilege once a waiver had already occurred by way of an adverse proceeding. Importantly, unlike an attempt to waive a privilege as to a third-party by one of the co-clients in proceedings that do not involve adversity between the co-clients, once the co-clients enter adverse proceedings against each other, both parties are subject to the waiver of the joint privilege. The privilege is thus waived by the parties, in accordance with the bilateral control rule.

The Court also reviewed other cases cited by Defendants that held that adversity between former co-clients does not remove privilege as against third parties. However, after careful consideration of the authorities relied on by those cases, the Court disagrees with their conclusion. For example, Arkin Kaplan Rice LLP v. Kaplan, 967 N.Y.S.2d 63, 64 (App. Div. 2013) does not provide any analysis to inform this Court of the reasons for its decision. The Jordan (Berm.) Inv. Co., Ltd. V. Hunter Green Invs. Ltd., 2006 U.S. Dist. LEXIS 69127, at *6 (S.D.N.Y. Sept. 27, 2006)[1] does not involve a waiver of joint privilege between co-clients pursuant to a subsequent adverse proceeding between them. Further, Newmarkets Partner, LLC v. Sal. Oppenheim Jr. & Cie. S. C.A., 258 F.R.D. 95, 105-06 (S.D.N.Y. 2009) relies on Am. S. S. Owners Mut.

[1] The Court cites to certain unpublished decisions to identify the cases relied on by the parties. The Court does not rely on the holdings in unpublished decisions in reaching its decision.

Protection and Indem. Ass'n, Inc. v. Alcoa S. S. Co., 232 F.R.D. 191, 198-99 (S.D.N.Y. 2005), which involves a director's right to invoke the attorney-client privilege against a fellow director to preclude the distribution of information. After concluding that the attorney-client privilege cannot be used as both a sword and a shield, the court held that the parties waived the privilege by putting the privileged documents "at issue" in litigation. Newmarkets cites to the Alcoa decision for the proposition that the broad subject matter waiver in an adverse proceeding is limited to the adverse parties only, but protected as against the third-parties. However, this Court found no support in the Alcoa decision, and the citation to the Alcoa decision, for the holding in Newmarkets. Similarly, In re Fundamental Long Term Care, Inc., 489 B.R. 451, 476 (Bankr. M.D. Fla. 2013) does not cite to any authority for its decision to extend protection of joint privilege as to third-parties, once it has already been waived in adverse litigation between the co-clients. Therefore, the Court declines to follow the decisions of these cases.

For the aforementioned reasons, any privilege shared by the former co-parties on the issue of LCP related liabilities was waived by way of the current litigation. The memoranda in question discusses potential responsible parties with regard to the liabilities of the LCP site. Therefore, the documents Ashland submitted for the Court's in camera review are not privileged

because the privilege was waived once ISP and G-I entered in adverse proceedings in relation to the LCP site.

Finally, a party seeking to seal a record must show by a preponderance of the evidence that (1) disclosure of the agreement's terms will likely cause a serious and defined injury, and (2) the party's privacy interests substantially outweigh the presumption that court records are to be open for inspection. R. 1:38-11. Further, Rule1:38-11 did not eliminate the requirement, which predated the rule, that a party seeking to seal a record must demonstrate with specificity the need for secrecy for each document sought to be sealed. See Hammock by Hammock v. Hoffmann-Laroche, 142 N.J. 356, 381-82 (1995). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id.

Here, G-I did not specify the serious injury that will likely result if the memoranda discussing the LCP site is not sealed. Furthermore, even though G-I maintains that there is no public interest in disclosing the memoranda to the public, the New Jersey Supreme Court has recognized that there is a strong presumption in favor of public access to pre-trial materials, briefs, and documents filed with the court. Hammock by Hammock, 142 N.J. at 381, 386. Furthermore, having determined that the documents in question are not privileged, the Court is unable to find a basis for sealing the memoranda.

The memoranda discussing liabilities of the LCP site is relevant to the current litigation, thus a motion for *in camera* inspection and determination whether it is privileged is within the jurisdiction of this Court. The memoranda are not privileged because parties to the co-client privilege G-I/GAF and SPI waived any privilege they had when they initiated adverse proceedings against one another. Finally, the Court cannot determine that G-I's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection. Therefore, the LCP related memoranda are not subject to seal. Ashland's Motion for *In Camera* Inspection and determination that certain documents are no longer privileged is GRANTED.

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ASHLAND INC.; INTERNATIONAL SPECIALTY PRODUCTS, INC.; and ISP ENVIRONMENTAL SERVICES, INC.,

Plaintiffs,

v.

G-I HOLDINGS INC.; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; GAF CORPORATION; JOHN AND JANE DOES 1-20; and ABC COMPANIES 1-20,

Defendants.

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY: LAW DIVISION

DOCKET NO. MRS L-2331-15

Civil Action

ORDER GRANTING THE MOTION FOR SUMMARY JUDGMENT ON BEHALF OF G-I HOLDINGS INC. AND GAF CORPORATION ONLY

THIS MATTER having been opened to the Court by Defendants G-I Holdings Inc. ("G-I") and GAF Corporation ("GAF"), by and through their attorneys, Sills Cummis & Gross P.C. and Quinn Emanuel Urquhart & Sullivan, LLP, for an Order granting summary judgment in favor of G-I and GAF (the "Motion"), and the Court having considered the parties' submissions, and having heard the parties' arguments, if any, and for good cause shown;

IT IS on this 30th day of May, 2018, Denied

ORDERED that the Motion is hereby ~~granted in its entirety; and it is further~~

ORDERED that the Complaint of Plaintiffs Ashland ~~LLC~~ (f/k/a Ashland Inc.), International Specialty Products Inc., and ISP Environmental Services Inc. filed on or about September 30, 2015, is hereby ~~dismissed~~ with prejudice as against G-I and GAF; and it is further

ORDERED that a copy of this Order shall be served on all parties within 5 days of receipt by G-I and GAF's counsel.

HON. FRANK DEANGELIS, J.S.C.

✓ Opposed

____ Unopposed

See attached decision

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2331-15

ASHLAND INC., INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES, INC.,

Plaintiff(s),

v.

G-I HOLDINGS INC.; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; GAF CORPORATION; JOHN AND JANE DOES 1-20; and ABC COMPANIES 1-20

Defendant(s).

Decided: May 30, 2018

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G-I HOLDINGS INC., STANDARD INDUSTRIES INC F/K/A BUILDING MATERIALS CORPORATION OF AMERICA, AND GAF CORPORATION

FRANK J. DEANGELIS, J.S.C.

The current matter comes before Court by way of motions for summary judgment and cross motion to strike certain affirmative defenses. The underlying dispute stems from a claim for breach of an indemnification agreement. In the early 1950s GAF Corporation constructed a chlor-alkali plant at an industrial site in the Tremley Point section of Linden, New Jersey (the "LCP Site"). The operations of the former chlor-alkali plant and other activities at the LCP Site by GAF Corporation from approximately 1950 to 1972 resulted in the contamination of the LCP site with various hazardous substances, including mercury. GAF Corporation operated the plant until it sold the LCP site to Linden Chlorine Products, Inc. in 1972. In or about 1985 chlor-alkali manufacturing operations at the LCP site ceased.

In 1986, GAF Corporation transferred assets of its Chemical Division to its subsidiary GAF Chemicals Corporation. In 1989, GAF Corporation's assets and liabilities were transferred to two entities - Dorset and Edgecliff Inc. Both companies went through

a series of mergers and corporate restructuring with Edgecliff later becoming GAF Building Materials Corporation ("GAF BMC") and G-I Holdings ("G-I"), and Dorset later becoming GAF Chemicals Corporation with International Specialty Products ("ISP") as its subsidiary and ISP Environmental Services ("IES") as ISP's subsidiary. Both companies, however, retained certain environmental liabilities as a result of the 1989 liquidation of GAF Corporation.

In 1991, ISP assumed certain liabilities relating to the manufacture and sale of specialty chemicals at Linden, NJ from the second GAF Corporation and GAF Chemicals Corporation. In October 1996, GAF, G-I, G Industries, GAF Chemicals, and ISP Holdings entered into an indemnification agreement (the "Indemnification Agreement") in connection with spin-off transactions. In 2009, G-I entered into a Plan of Reorganization under Chapter 11 of the Bankruptcy Code. The 1996 Indemnification Agreement was assumed by G-I when the Plan was confirmed. On or around August 23, 2011, Ashland Inc. ("Ashland") acquired ISP Holdings and its subsidiaries, and is currently the parent company of ISP and IES. In or around 1994, the United States Environmental Protection Agency (the "EPA") began to investigate the LCP site due to documented releases of hazardous substances at the site through the years. In early 1999, EPA issued an AOC. IES and ISP voluntarily entered into the EPA AOC in 1999, as a Potentially

Responsible Party ("PRP") for the LCP site and voluntarily participated in the RI/FS from 1999 to 2014. In 2014, EPA issued a Record of Decision for cleanup of the LCP site with an estimated $36.3 million cost for the cleanup. On September 18, 2015, Ashland, Inc., ISP and IES ("Plaintiffs") sent G-I, GAF Corporation[1] and GAF BMC notice of a Claim of Environmental Liability based upon the natural resource damage assessment done by the federal agencies investigating the LCP Site and demanded indemnification under the Indemnification Agreement. Defendants refused to indemnify Plaintiffs for these costs.

On September 30, 2015, Plaintiffs filed a Complaint seeking a declaratory judgment that Defendants G-I, Building Materials Corporation of America, and GAF Corporation are in breach of the Indemnification Agreement and pursuant to the Indemnification Agreement must indemnify Plaintiffs for any costs or liabilities incurred in connection with the investigation and remediation of the LCP Site. On March 27, 2018, G-I and GAF Corporation ("Defendants") filed a summary judgment motion on the grounds that Plaintiffs' claims against them are barred by the bankruptcy discharge and that Plaintiffs should be estopped from disclaiming CERCLA liability for the LCP site on the basis of Plaintiffs' prior representations and positions. On April 19, 2018, Plaintiffs filed

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an opposition and cross-motion asserting that the bankruptcy proceedings do not shield Defendants from liability and that Defendants' estoppel arguments must be rejected. All issues have been fully briefed by the parties.

Under R. 4:46-2(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged, and that the moving party is entitled to a judgment or order as a matter of law." As the Brill Court explained, the "essence" of the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Brill v. The Guardian Life Insurance Co., 142 N.J. 520 (1995) (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 251-52 (1986)). Moreover, "on a motion for summary judgment the court must grant all the favorable inferences to the non-movant." Brill, 142 N.J. at 536. Although non-movants obtain the benefit of all favorable inferences, bare conclusions without factual support in affidavits or the mere suggestion of some metaphysical doubt as to the material facts will not overcome motions for summary judgment. R. 4:46-5; see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999) (requiring submission of factual support in affidavits to oppose summary judgment motion); Fargas v. Gorham,

276 N.J. Super. 135 (Law Div. 1994) (self-serving assertions alone will not create a question of material fact sufficient to defeat summary judgment motion); Heljon Management Corp. v. Di Leo, 55 N.J. Super. 306, 312 (App. Div. 1959) ("It is not sufficient for the party opposing the motion merely to deny the fact in issue where means are at hand to make possible an affirmative demonstration as to the existence or non-existence of the fact."). A non-moving party "cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Therefore, if the opposing party only points to "disputed issues of fact that are 'of an insubstantial nature' the proper disposition is summary judgment." Id.

Defendants argue that Plaintiffs' claim for indemnification is precluded by the bankruptcy discharge because Plaintiffs were claimholders at the time of G-I's bankruptcy and they failed to seek any relief. Defendants submit that at the time of the bankruptcy Plaintiffs knew of the CERCLA claims that give rise to the present action. Defendants further argue that any claims discharged in bankruptcy proceedings include potential and unmatured contract claims and any other contingent claim. Thus, since the conduct that gave rise to the CERCLA liability predated G-I's bankruptcy petition, any claims that Plaintiffs had arising out of CERCLA liabilities were discharged in their entirety at the time of G-I's bankruptcy because Plaintiffs failed to seek any

relief for such claims or any further claims based upon the same activity. Plaintiffs contend that Defendants' indemnity obligations arise not out of environmental claims for liability under CERCLA that were discharged by the Bankruptcy Plan but out of an executory contract. Further, Plaintiffs argue that Defendants' assumption of the executory agreement effectively renewed the contract and its obligations, thus removing it from the bankruptcy discharge provisions.

The Bankruptcy Code defines a "claim" as "a right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5). The term "claim" is broadly construed under the Bankruptcy Code. Nobelman v. American Savings Bank, 508 U.S. 324, 331 (1993) ("[t]he unqualified word 'claim' is broadly defined under the Code"). The term 'claim' is [also] coextensive with the term "debt." Penn. Dep't of Public Welfare v. Davenport, 495 U.S. 552 (1990). A "debt" is a "liability on a claim." 11 U.S.C. § 101(12).

The determination of whether a claim is pre-petition or post-petition is of utmost importance in bankruptcy because if the claim arises pre-petition it can be discharged by the Chapter 11 debtor's plan of reorganization. See 11 U.S.C. § 1141(d)(1)(A) (stating that the confirmation of a plan discharges the debtor from debt arising before the date of plan confirmation). The Bankruptcy Code does not clearly establish when a right to payment arises, but caselaw has held that claims "arise[] ... when all transactions necessary for liability have occurred, regardless of whether the claim was contingent when the petition was filed." In re Myers, 362 F.3d 667 (10th Cir. 2004).

While Defendants argue that ISP's claims against G-I and GAF are environmental claims that accrued pre-petition, Plaintiffs contend that their claims are not environmental but, instead, indemnity claims arising under an executory contract, which was not discharged because it was assumed by Defendants. Defendants are correct that generally if not assumed, environmental claims are discharged. However, such is not the case here.

An executory contract differs from other pre-petition claims in that courts have held that the assumption of an executory contract requires performance of that contract "in full just as if the bankruptcy had not intervened." In re Frontier Prop., 979 F.2d 1358, 1367 (9th Cir. 1992). The term "executory contract" is not defined in the Code, but as the court observed in In re Exide

Techs., 340 B.R. 222, 229 (Bankr. D. Del. 2006), courts in this Circuit use the Countryman standard, which provides that a contract is executory when "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973). See also Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39 (3d Cir. 1989).

Here, the Court concludes that the Indemnification Agreement is an executory contract. Although, the Court is cognizant that indemnification agreements are not always executory, courts look not to the type of the agreement but to the obligations under the agreement to determine whether the contract is an executory contract. See In re Van Dyk Research Corp., 13 B.R. 487, 503-06 (Bankr. D. N.J. 1981) (holding that debtor's indemnification obligation in purchase agreement, that that only required payment by the debtor, was not executory contract); see also Sharon Steel Corp. v. National Fuel Distribution Corp., 872 F.2d 36, 39 (3d Cir. 1989) (adopting the Countryman standard). The Court finds that the Defendants had ongoing, material, unperformed obligations to one another as of the commencement of the bankruptcy case. These obligations included reciprocal indemnification obligations. Therefore, unlike In re Van Dyk Research Corp. where the obligation

to indemnify was one-sided, the present Indemnification Agreement is executory.

Further, the Bankruptcy Code provides that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Once an executory contract is assumed, a debtor is subject to the benefits and burdens of the contract. In re Fleming Cos., 499 F.3d 300, 308 (3d Cir. 2007). To affect the right to assume or reject a contract or lease, the pre-petition termination of said agreement must be complete and not subject to reversal either under the terms of the agreement or under applicable state law. In re Tudor Motor Lodge Assocs. Ltd. Partnership, 102 B.R. 936, 949 (Bankr. D.N.J. 1989). It is undisputed that no court has determined that the Indemnification Agreements was terminated prior to the filing of the bankruptcy petition. Nor do the parties dispute that there was no termination by way of a material breach of the Indemnification Agreement prior to the commencement of the bankruptcy. The entry of the Confirmation Order by the Bankruptcy Court constituted an order approving the assumptions of any executory contracts including the Indemnification Agreement pursuant to sections 365(a) and 1123 of the Bankruptcy Code. See e.g., In re Marple Publ'g Co., 20 B.R. 933, 934 (Bankr. E.D. Pa. 1982) ("if an unexpired lease is assumed by a debtor in possession under the Code, and such action is

approved by the court, such assumption creates a new administrative obligation of the estate which is payable as a first priority . . . . Equally important is the fact that such assumed obligation is a postpetition debt that is not discharged by a confirmation of a chapter 11 case, and it therefore continues to be an obligation of the reorganized debtor.").

This outcome is not changed by the holding of Diamond, Cellnet and NCL cited by Defendants. Relying on In re Diamond Mfg. Co., 164 B.R. 189, 201 (Bankr. S.D. Ga.1994), the court in Cellnet concluded that "[w]here the nonbankrupt party has knowledge of facts sufficient to place the party on notice that a 'potential' pre-confirmation breach has occurred, res judicata bars that party from later asserting a claim based upon the pre-petition breach." Here, however, breach of the Indemnification Agreement did not occur until after the confirmation. Furthermore, in NCL Corp. v. Lone Star Building Centers (Eastern) Inc., 144 B.R. 170, 178-79 (S.D. Fla. 1992), the court, in an environmental contamination matter, found res judicata barred a landowner's claim against a subsequent lessee where a predecessor lessee had assumed a lease in a bankruptcy proceeding and the owner had not raised pre-assumption defaults concerning lease provisions requiring compliance with legal and regulatory requirements at the time the bankruptcy court approved the lease assumption. The subsequent lessee, however, remained liable for any post-assumption

violations. Id. The Record of Decision from the EPA with an estimate of the cleanup costs was presented post-assumption, in 2014. There is also no dispute here that a demand for indemnification and subsequent refusal of indemnification occurred post-petition in 2015. Therefore, indemnification claims presented to the Court by Plaintiffs are based on post-assumption obligations and are not barred by res judicata.

As Plaintiffs point out, Defendants could have rejected the executory contract during the bankruptcy proceedings, but chose not to do so. The Plan did not expressly provide that all executory contracts, including the Indemnification Agreement, were rejected; Defendants did not dispute the effectiveness of the Indemnification Agreement; and Defendants specifically assumed the Indemnification Agreement prior to the commencement of the bankruptcy case. Therefore, the Court holds that under these facts, the Indemnification Agreement was not discharged in Defendants' bankruptcy proceedings.

Defendants also assert that Plaintiffs are now estopped from seeking indemnification for the CERCLA liability because Plaintiffs accepted responsibility for the LCP Site in the Environmental Coverage Action and failed to assert any potential claim with respect to the cleanup costs against Defendants in the bankruptcy proceedings. Judicial and quasi estoppel doctrines are narrowly construed and are generally reserved for extraordinary

circumstances that warrant their application to avoid a miscarriage of justice. Kimball International Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 608 (App. Div. 2000), cert. denied, 167 N.J. 88 (2001). These doctrines are most often used to prevent a debtor from concealing potential causes of action from the court and deter misrepresentation of a debtor's financial reality in an effort to later recover on undisclosed interests. See, e.g., Krystal Cadillac-Oldsmobile GMC Truck Inc. v. General Motors Corp., 337 F.3d 314, 322-23 (3d Cir. 2003) ("The [Bankruptcy] Code requires that a debtor list potential causes of action, not claims it actually intends to sue on at the time of the required disclosure."); Seward v. Devine, 888 F.2d 957, 963 (2d Cir. 1989) ("The bankruptcy estate. . . includes any causes of action possessed by the debtor."); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988) ("It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy contest.").

For example, in Oneida, the court determined that in light of the protections that the Chapter 11 process offers the debtor and the express statutory directives to disclose potential litigation, a debtor has a duty to disclose potential future litigation or causes of action that impact creditors' claims. Oneida Motor Freight, Inc., 848 F.2d at 417-18, 420. By failing to raise its potential future claims in its schedules, disclosure statement, or

reorganization plan, the court found that the debtor violated a duty of candor and effectively misrepresented that it never contemplated these claims. Id. at 418-19. The court further ruled that this misrepresentation impacted upon the creditor's decision to approve a settlement agreement and subsequent reorganization plan. Id. at 419. Accordingly, judicial estoppel barred the subsequent cause of action because the debtor successfully attained confirmation of its reorganization plan while remaining silent to its challenge to the creditor's underlying claims. Id. at 419-20.

In the present case, Plaintiffs voluntarily entered in an AOC, however, there is no evidence that Plaintiffs disavowed any indemnification obligations that were due to them for cleanup costs under the Indemnification Agreement and the Assumption Agreement. Moreover, the EPA's 104(e) Request for Information responses are not binding on the parties and thus, cannot be the basis for estoppel. See United States v. A & N Cleaners & Launderers, 842 F. Supp. 1543, 1549 (S.D.N.Y 1994) (finding that inconsistencies between information requests and answers to interrogatories do not eliminate a triable issue of fact). Moreover, there is no evidence that Plaintiffs have, in bad faith, concealed their indemnification claims from the Bankruptcy Court. On the contrary, the Indemnification Agreement was assumed by Defendants in bankruptcy, therefore, the parties had full knowledge of their

obligations under the Indemnification Agreement. Also, the Court notes that at the time of the bankruptcy proceedings, GAF, G-I, ISP and IES shared a legal department, prior to its post-bankruptcy acquisition by Ashland, which indicates Defendants' awareness of any potential claims and liabilities against them with respect to obligations prior and during the bankruptcy proceedings. In fact, Defendants previously presented the Court with letters from its own counsel indicating a potential dispute relating to the LCP Site liabilities. Under these facts, the Court finds no basis for the application of estoppel and quasi-estoppel doctrines.

Because the Indemnification Agreement was expressly assumed by the Defendants, the Agreement was not discharged. Therefore, Plaintiffs' claims are not barred by the bankruptcy discharge. Accordingly, Defendants' motion for summary judgment based on the bankruptcy discharge is DENIED; Plaintiffs' cross-motion to strike Defendants' affirmative defenses based on estoppel related to the bankruptcy discharge is GRANTED.

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ISP Environmental Services Inc.

FILED
MAY 30 2018
Hon. Frank J. DeAngelis, J.S.C.
Morris County

ASHLAND INC.; INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES INC., Plaintiffs, v. G-I HOLDINGS INC.; GAF CORPORATION; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; and FICTITIOUS COMPANIES 1-20, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NO. MRS-L-2331-15 Civil Action [redacted] **ORDER**

THIS MATTER having been opened to the Court by Plaintiffs, Ashland Inc. ("Ashland"), International Specialty Products Inc. ("ISP"), ISP Environmental Services Inc. ("IES"), and ISP Chemco LLC ("ISP Chemco") (collectively "Plaintiffs"), by and through their counsel, Gibbons P.C., in opposition to Defendants' Motion for Summary Judgment and on Cross-Motion to Strike Defendants' Second, Third and Seventh Affirmative Defenses, and the Court having considered the papers and arguments of counsel, and good cause having been shown,

IT IS on this 30th day of May, 2018

ORDERED that the Defendants' Motion for Summary Judgment be and hereby is **DENIED,** without imposition of fees or costs as to any party; and it is further

granted in part Affirmative Defenses

ORDERED that Plaintiffs' Cross-Motion to Strike Defendants' Second, Third and ~~Seventh Affirmative Defenses,~~ be and hereby is **GRANTED**; and it is further

ORDERED that a copy of this Order be served upon all counsel of record within ~~seven~~ 5 ~~(7)~~ days of Plaintiffs' counsel's receipt hereof.

HON. FRANK J. DEANGELIS, J.S.C.

This Motion is

✓ Opposed

_____ Unopposed

See attached decision

NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2331-15

ASHLAND INC., INTERNATIONAL SPECIALTY PRODUCTS INC.; and ISP ENVIRONMENTAL SERVICES, INC.,

Plaintiff(s),

v.

G-I HOLDINGS INC.; BUILDING MATERIALS CORPORATION OF AMERICA d/b/a GAF MATERIALS CORPORATION; GAF CORPORATION; JOHN AND JANE DOES 1-20; and ABC COMPANIES 1-20

Defendant(s).

Decided: May 30, 2018

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Here, the Court concludes that the Indemnification Agreement is an executory contract. Although, the Court is cognizant that indemnification agreements are not always executory, courts look not to the type of the agreement but to the obligations under the agreement to determine whether the contract is an executory contract. See In re Van Dyk Research Corp., 13 B.R. 487, 503-06 (Bankr. D. N.J. 1981) (holding that debtor's indemnification obligation in purchase agreement, that that only required payment by the debtor, was not executory contract); see also Sharon Steel Corp. v. National Fuel Distribution Corp., 872 F.2d 36, 39 (3d Cir. 1989) (adopting the Countryman standard). The Court finds that the Defendants had ongoing, material, unperformed obligations to one another as of the commencement of the bankruptcy case. These obligations included reciprocal indemnification obligations. Therefore, unlike In re Van Dyk Research Corp. where the obligation

to indemnify was one-sided, the present Indemnification Agreement is executory.

Further, the Bankruptcy Code provides that a trustee or debtor in possession "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). Once an executory contract is assumed, a debtor is subject to the benefits and burdens of the contract. In re Fleming Cos., 499 F.3d 300, 308 (3d Cir. 2007). To affect the right to assume or reject a contract or lease, the pre-petition termination of said agreement must be complete and not subject to reversal either under the terms of the agreement or under applicable state law. In re Tudor Motor Lodge Assocs. Ltd. Partnership, 102 B.R. 936, 949 (Bankr. D.N.J. 1989). It is undisputed that no court has determined that the Indemnification Agreements was terminated prior to the filing of the bankruptcy petition. Nor do the parties dispute that there was no termination by way of a material breach of the Indemnification Agreement prior to the commencement of the bankruptcy. The entry of the Confirmation Order by the Bankruptcy Court constituted an order approving the assumptions of any executory contracts including the Indemnification Agreement pursuant to sections 365(a) and 1123 of the Bankruptcy Code. See e.g., In re Marple Publ'g Co., 20 B.R. 933, 934 (Bankr. E.D. Pa. 1982) ("if an unexpired lease is assumed by a debtor in possession under the Code, and such action is

approved by the court, such assumption creates a new administrative obligation of the estate which is payable as a first priority . . . . Equally important is the fact that such assumed obligation is a postpetition debt that is not discharged by a confirmation of a chapter 11 case, and it therefore continues to be an obligation of the reorganized debtor.").

This outcome is not changed by the holding of Diamond, Cellnet and NCL cited by Defendants. Relying on In re Diamond Mfg. Co., 164 B.R. 189, 201 (Bankr. S.D. Ga.1994), the court in Cellnet concluded that "[w]here the nonbankrupt party has knowledge of facts sufficient to place the party on notice that a 'potential' pre-confirmation breach has occurred, res judicata bars that party from later asserting a claim based upon the pre-petition breach." Here, however, breach of the Indemnification Agreement did not occur until after the confirmation. Furthermore, in NCL Corp. v. Lone Star Building Centers (Eastern) Inc., 144 B.R. 170, 178-79 (S.D. Fla. 1992), the court, in an environmental contamination matter, found res judicata barred a landowner's claim against a subsequent lessee where a predecessor lessee had assumed a lease in a bankruptcy proceeding and the owner had not raised pre-assumption defaults concerning lease provisions requiring compliance with legal and regulatory requirements at the time the bankruptcy court approved the lease assumption. The subsequent lessee, however, remained liable for any post-assumption

violations. Id. The Record of Decision from the EPA with an estimate of the cleanup costs was presented post-assumption, in 2014. There is also no dispute here that a demand for indemnification and subsequent refusal of indemnification occurred post-petition in 2015. Therefore, indemnification claims presented to the Court by Plaintiffs are based on post-assumption obligations and are not barred by res judicata.

As Plaintiffs point out, Defendants could have rejected the executory contract during the bankruptcy proceedings, but chose not to do so. The Plan did not expressly provide that all executory contracts, including the Indemnification Agreement, were rejected; Defendants did not dispute the effectiveness of the Indemnification Agreement; and Defendants specifically assumed the Indemnification Agreement prior to the commencement of the bankruptcy case. Therefore, the Court holds that under these facts, the Indemnification Agreement was not discharged in Defendants' bankruptcy proceedings.

Defendants also assert that Plaintiffs are now estopped from seeking indemnification for the CERCLA liability because Plaintiffs accepted responsibility for the LCP Site in the Environmental Coverage Action and failed to assert any potential claim with respect to the cleanup costs against Defendants in the bankruptcy proceedings. Judicial and quasi estoppel doctrines are narrowly construed and are generally reserved for extraordinary

circumstances that warrant their application to avoid a miscarriage of justice. Kimball International Inc. v. Northfield Metal Products, 334 N.J. Super. 596, 608 (App. Div. 2000), cert. denied, 167 N.J. 88 (2001). These doctrines are most often used to prevent a debtor from concealing potential causes of action from the court and deter misrepresentation of a debtor's financial reality in an effort to later recover on undisclosed interests. See, e.g., Krystal Cadillac-Oldsmobile GMC Truck Inc. v. General Motors Corp., 337 F.3d 314, 322-23 (3d Cir. 2003) ("The [Bankruptcy] Code requires that a debtor list potential causes of action, not claims it actually intends to sue on at the time of the required disclosure."); Seward v. Devine, 888 F.2d 957, 963 (2d Cir. 1989) ("The bankruptcy estate. . . includes any causes of action possessed by the debtor."); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988) ("It has been specifically held that a debtor must disclose any litigation likely to arise in a non-bankruptcy contest.").

For example, in Oneida, the court determined that in light of the protections that the Chapter 11 process offers the debtor and the express statutory directives to disclose potential litigation, a debtor has a duty to disclose potential future litigation or causes of action that impact creditors' claims. Oneida Motor Freight, Inc., 848 F.2d at 417-18, 420. By failing to raise its potential future claims in its schedules, disclosure statement, or

reorganization plan, the court found that the debtor violated a duty of candor and effectively misrepresented that it never contemplated these claims. Id. at 418-19. The court further ruled that this misrepresentation impacted upon the creditor's decision to approve a settlement agreement and subsequent reorganization plan. Id. at 419. Accordingly, judicial estoppel barred the subsequent cause of action because the debtor successfully attained confirmation of its reorganization plan while remaining silent to its challenge to the creditor's underlying claims. Id. at 419-20.

In the present case, Plaintiffs voluntarily entered in an AOC, however, there is no evidence that Plaintiffs disavowed any indemnification obligations that were due to them for cleanup costs under the Indemnification Agreement and the Assumption Agreement. Moreover, the EPA's 104(e) Request for Information responses are not binding on the parties and thus, cannot be the basis for estoppel. See United States v. A & N Cleaners & Launderers, 842 F. Supp. 1543, 1549 (S.D.N.Y 1994) (finding that inconsistencies between information requests and answers to interrogatories do not eliminate a triable issue of fact). Moreover, there is no evidence that Plaintiffs have, in bad faith, concealed their indemnification claims from the Bankruptcy Court. On the contrary, the Indemnification Agreement was assumed by Defendants in bankruptcy, therefore, the parties had full knowledge of their

obligations under the Indemnification Agreement. Also, the Court notes that at the time of the bankruptcy proceedings, GAF, G-I, ISP and IES shared a legal department, prior to its post-bankruptcy acquisition by Ashland, which indicates Defendants' awareness of any potential claims and liabilities against them with respect to obligations prior and during the bankruptcy proceedings. In fact, Defendants previously presented the Court with letters from its own counsel indicating a potential dispute relating to the LCP Site liabilities. Under these facts, the Court finds no basis for the application of estoppel and quasi-estoppel doctrines.

Because the Indemnification Agreement was expressly assumed by the Defendants, the Agreement was not discharged. Therefore, Plaintiffs' claims are not barred by the bankruptcy discharge. Accordingly, Defendants' motion for summary judgment based on the bankruptcy discharge is DENIED; Plaintiffs' cross-motion to strike Defendants' affirmative defenses based on estoppel related to the bankruptcy discharge is GRANTED.